IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

NO.

PEN-KEN GAS & OIL CORPORATION,
Appellant,

VS.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Suit filed May 9, 1940. Plaintiff's claim is in two counts for damages. The first count is that in 1930, and thereafter, the defendant entered the real estate of plaintiff described by metes and bounds in the complaint, situated in Knott, Floyd, and Pike Counties, Kentucky, constructed numerous wells thereon, and extracted large quantities of natural gas which it converted to its own use. The second

count is that defendant entered upon and ejected plaintiff from said real estate. The damages claimed are $70,466,900.00.

The defendant answered, admitting diversity of citizenship and that the court had jurisdiction. The answer denies plaintiff is the owner of the real estate described; admits defendant has drilled gas wells and constructed pipe lines upon, and extracted natural gas from, portions of Pike and Floyd Counties in the area claimed by plaintiff; denies that natural gas was extracted to the value claimed, and alleges that defendant rightfully entered said real estate and extracted natural gas by reason of leases made from lessors who were rightful owners of said portions of said real estate, which leases and locations are hereinafter set forth in detail. Defendant denies that it wrongfully entered upon and ejected plaintiff and denies plaintiff is entitled to possession or to damages.

The property involved in this suit is a part of a Virginia grant of 300,000 acres made February 16, 1797 (R. 57-58), to Benjamin Haskell, and will hereinafter be referred to as the "Haskell grant." It lies in Pike, Floyd, Knott and Letcher Counties and is shown on a map marked Defendant's Exhibit A (R. 136). It is admitted that on February 26, 1931, Whitney and wife executed a deed to the plaintiff (R. 210); that on June 31, 1931, Arvidson and wife executed a further deed to the plaintiff (R. 206-7). Plaintiff became, and was at the time of the filing of the suit, vested with legal title to the Haskell grant through and by a complete chain of title, commencing with the original grant to Benjamin Haskell (R. 137).

Defendant filed eight affirmative defenses and moved to dismiss the suit by summary judgment, supported by affidavits, and a complete certified transcript of the record

of a certain proceeding (hereafter referred to as Pike County forfeiture suit) filed in the Supreme Court of the United States in *The Eastern Kentucky Coal Lands Corporation* v. *The Commonwealth of Kentucky* (55 L. Ed. 137) (R. 29-126), which was admitted by plaintiff to be a complete transcript of the proceedings had and by virtue of which it was claimed by defendant title was forfeited to the Commonwealth of Kentucky by the Pike County Circuit Court for non-payment of taxes in 1907.

Owners or claimants other than those interested in the Haskell grant appealed from the Pike County forfeiture proceeding and the constitutionality of the Forfeiture Act was sustained by the Court of Appeals of Kentucky (111 S. W. 362) and by this court (55 L. Ed. 137). None of the questions here presented is passed upon by either the Court of Appeals of Kentucky or by this court in the forfeiture litigation.

Plaintiff filed counter-motions to strike the motion for summary judgment and the affidavits attached thereto; strike, overrule and deny each of the affirmative defenses; strike, overrule and deny each of the five grounds set forth in defendant's motion for summary judgment (R. 223-227).

Plaintiff further filed its answer on the facts with supporting affidavits and moved the court to enter summary judgment in favor of the plaintiff, upon each and every affirmative defense of the defendant; moved the court to deny the motion of defendant for summary judgment upon each of the grounds set forth by defendant; and demanded a jury trial on every factual question and issue in the cause (R. 227-271).

Defendant did not question the sufficiency or form of any of plaintiff's affidavits which plainly raised genuine issues on the material facts.

It is the contention of plaintiff the forfeiture proceedings for non-payment of taxes, so far as it purported to forfeit the Haskell grant, was null and void, and even though valid was limited to that part of the Haskell grant lying in Pike County by virtue of the limitations of the complaint and the judgment of forfeiture.

At the time of the filing of the Pike County forfeiture suit, there was in full force and effect a statute (Chapter 22 of the Act of the General Assembly of 1906, Carroll's Kentucky Statutes), entitled "An Act Relating to Revenue and Taxation." The Pike County forfeiture suit and a subsequent forfeiture suit commenced by the Commonwealth in Floyd County, were predicated upon Article III of said legislative act. That part of the Act necessary to a decision of this case is set forth in the Appendix.

The Commonwealth's forfeiture complaint in Pike County alleged that a part of the grant was within the boundaries of Pike County, Kentucky (R. 37). In the body of the complaint Robert Boyd and Charles Selden were described as known owners and claimants (R. 40), and the address of Charles Selden was stated to be New York City (R. 40). Charles Selden was named and made a party defendant in the caption of the petition (R. 36-37), prayer (R. 52), and warning order (R. 55-56). Robert Boyd, described as a known owner of the Haskell grant in the body of the petition, was not named as a party defendant in the caption, prayer or warning order. Other parties described as being owners or claimants in the Haskell grant were not in fact owners or claimants (R. 55). Neither Boyd nor Selden were personally served with summons and did not appear individually or by attorney in the Pike County forfeiture proceeding. If valid service was had on them it was by publication notice under Sec. 3, Article III.

Section 3 of Article III requires a notice of the pending forfeiture action to be given "by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted." The record is silent as to any attempt on the part of the clerk to comply with this prerequisite of the statute.

Section 3 of Article III also required compliance with the requirements of the Civil Code of Practice of Kentucky respecting process and service. Sections of the Civil Code of Practice of Kentucky applicable to said forfeiture proceeding are: Section 56 (actual service), and 57 (constructive service) aforesaid.

No service was had upon any of the parties through whom this petitioner here acquired its title as required by Section 56. No warning order was ever made by the clerk as required by Section 57.

By judgment entered June 20, 1908, the title to the Haskell grant in Pike County was forfeited and said title and claim thereto "is now transferred to and vested in the Commonwealth." No further proceedings were had in said forfeiture proceeding other than an appeal to the Supreme Court of Kentucky and then to the United States Supreme Court on questions of law relating to the constitutionality of the forfeiture statute.

Under Article III, Sec. 4, certified copies of the judgment of the Circuit Court of forfeiture and sale were required to be "recorded in the deed book of the county where the land or any part thereof lies and indexed as deeds are required to be indexed." The Pike County forfeiture judgment was not recorded in Pike, Floyd, Knott or Letcher Counties (R. 246-248, Par. 15).

Article III of the forfeiture statute was repealed on April 21, 1938, without a saving clause respecting pending litigation.

On January 3, 1941, the Commonwealth of Kentucky filed a second forfeiture proceeding in the Circuit Court of Floyd County, Kentucky, which petition was directed against the entire Haskell Grant. Proper service was made on your petitioner and others in this proceeding.

Petitioner here answered said petition, admitting it was the owner, and denying that it had not listed said property for taxes in said County, and further set forth the following:

(1) "That this court is wholly without jurisdiction for the reason that said Article III of Chapter 22 of the Acts of the General Assembly of 1906, upon which the said suit is predicated, was repealed by an Act of the General Assembly at the first special session held in 1938, and that said Act relied upon by the plaintiff in this suit is not now, and was not at the time of the commencement of this suit, in force or effect," and

(2) "A forfeiture proceeding was heretofore and on, to wit, the 3rd day of June, 1907, commenced in the Pike County Circuit Court to forfeit said grant under the legislative acts of the State of Kentucky then in full force and effect; that it is claimed by the Commonwealth that said suit forfeited said Haskell grant in its entirety so far as the same lay in the State of Kentucky, and that said suit is still pending and undetermined, and that the Pike County Circuit Court has full and exclusive jurisdiction, and that this court is wholly without jurisdiction of the parties or of the subject matter, and that the rights of the Commonwealth and these defendants must be determined by the Pike Circuit Court and cannot be determined by this court." (R. 36-54).

Upon the trial of the forfeiture proceeding in Floyd County held on May 2, 1941, plaintiff moved to dismiss said suit on the two jurisdictional grounds mentioned and described in the preceding paragraphs, which motion was overruled, and upon the trial the jury returned a verdict in favor of the Commonwealth (R. 274).

ARGUMENT.

I.

A summary judgment proceeding can never be sustained where there is a controverted question of fact and if it becomes necessary for the court to weigh the evidence the motion for the summary judgment must be denied.

Up to the time of the decision in the present case, the law was clear that a summary judgment can only be awarded when the truth is clear and the facts not controverted.

Wyant v. *Crittenden*, 113 Fed. (2d) 170 (C. C. A. D. C.).

American Ins. Co. v. *Gentle Bros. Co.* (C. C. A. 5th, Fla. 1940), 109 Fed. 2d, 732; Certiorari denied in 1940, 60 S. Ct. 1075, 310 U. S. 633, 84 L. Ed. 1403;

Port of Palm Beach Dist. v. *Goethals* (C. C. A. 5th, Fla. 1939), 104 Fed. 2d, 706;

Dairy Engineering Corp. Ltd. v. *De-Raef Corp.* (D. C., Mo. 1941), 1 F. R. D. 679;

U. S. v. *Newbury Mfg. Co.* (D. C. Mass., 1941), 1, F. R. D. 718;

Whiteman v. *Federal Life Ins. Co.* (D. C., Mo. 1939), 1 F. R. D. 95.

Plaintiff was entitled to the "benefit of every doubt" *Weisser* v. *Mussam*, 127 Fed. (2nd) (C. C. A. 2nd), 344, 346.

The law is clear that the District Court on defendant's motion for summary judgment is duty bound to take account of all of the facts and allegations stated in affidavits of the parties, and not merely of those facts set forth by the defendant.

Wyant v. *Crittenden,* 113 Fed. (2d) 170.

The law is equally clear that a motion for summary judgment should only be sustained in a very clear case.

Whitman v. *Federal Ins. Co.,* 1 F. R. D. 95.

A summary judgment is a drastic remedy and never warranted except on a clear showing that no genuine issue as to any material facts remains for trial.

Schultz v. *Manufacturers & Traders Trust Co.,* 1 F. R. D. 45.

Plaintiff had demanded a trial by jury on all questions of fact (R. 230).

In making its decision in the present case, the Circuit Court of Appeals passed upon controverted questions of fact:

(1) The affidavits of the defendant and the plaintiff as to adverse possession are contradictory and show genuine issues on material facts.

(2) The posting of the publication notice in connection with which it is said in the opinion on the rehearing (R. 404):

> "Fairly weighing the evidence in the record of the posting of the notice and considering the lapse of time since the judgment in question was entered and the fact that the records are lost, it seems to us that the only judicial deduction now possible is that the peti-

tion was duly posted at the court house door as required under the statute."

(3) The payment of taxes discussed under Point VIII.

Each of these factual questions was controverted and the decision is in direct conflict with the decisions of the District of Columbia, Fifth, and Second Circuit Courts of Appeals as well as the decisions of the District Courts of Missouri and Massachusetts. A correct statement of the law by this Court on this point is of grave importance.

II.

Where a special State Statute as to the forfeiture to the State of title in lands for non-payment of taxes prescribes the procedural steps to be taken to legally effect and record such forfeiture, the fact of literal compliance with those prerequisites must appear of record to give the court jurisdiction.

The dilemma in which the Circuit Court of Appeals found itself on this point is best illustrated by what the court said on rehearing (R. 403):

> "Appellant says that we improperly applied the rule that the failure of the Clerk to note on the original petition the posting of the notice at the court house door was a mere irregularity. The reasoning of the opinion on the subject of said posting may not be comprehensive or satisfactory, but the conclusion reached is correct."

This is, indeed, a novel method of arriving at a decision of a lawsuit, *i. e.*, reaching a conclusion by reasoning neither comprehensive nor satisfactory.

In the trial of the case below, there was admitted into the record on defendant's motion what the plaintiff agreed

was a true record and what had been certified to by the Clerk of the Supreme Court of the United States as the true record (a photostatic copy) of the Pike County forfeiture suit. The Circuit Court of Appeals adjudicated it to be a "complete transcript of the record" (R. 336). Defendant relied on this record to defeat plaintiff's title. An examination of this admittedly true record demonstrates clearly that there was (R. 344-5) no compliance with the forfeiture statute. The Circuit Court of Appeals recognized this jurisdictional deficiency in the record and resorted to a presumption that nevertheless the original record might have carried evidence of a compliance. The court in its first opinion said:

> "When a collateral attack is made on a judgment, the court will presume that all proceedings in the original action necessary to sustain the validity of the judgment, were regular." (R. 346).

On rehearing the court said:

> "the (forfeiture) judgment in question must stand or fall by the same rules of law as any other judgment,"

and that an error in the certified copy of the proceeding may have occurred (R. 403).

The Circuit Court of Appeals failed to make the distinction pointed out in numerous cases, between those cases where the statute does not require a record of the proof of publication and those cases where the statute does require a record of the proof of publication. Presumptions may be indulged in in the former but are never indulged in in the latter class of cases. Section 3 of Article III of the Kentucky Forfeiture Statute requires the Clerk, immediately after the forfeiture petition is filed to *show by endorsement upon the original petition the time at which*

the copy was posted at the front door of the court house. It is the endorsement on the original petition which gives the court jurisdiction, not the posting of the notice. Without such endorsement upon the original petition, no valid publication is made. This court in *Applegate* v. *Lexington & Carter Co. Mining Co.*, 117 U. S. 255, 270, definitely recognizes the distinction and sustains the point.

The law in the 4th Circuit, in *Johnson* v. *Jarvis*, 223 Fed. 756 (758) is stated as follows:

> "The contention that the title under which plaintiff claims was lost by forfeiture to the state for failure to return the land for taxes was strongly presented, But forfeitures are not favored, and the burden was on the defendant to make clear proof of the loss of land in this way."

Hence, we find the decision of the lower court squarely in conflict with the decision of the Circuit Court of Appeals for the 4th Circuit, the Court of Appeals of Kentucky and also in conflict with the decision of this court.

The most appropriate citation petitioner can make as to the authority for the application of the principle of law here involved that defendants and the lower court are bound by the certified record of the Pike County forfeiture offered by defendant to defeat plaintiff's title is a decision of the same Circuit Court of Appeals to which this petition for a writ of certiorari is directed, made at the same term, and where the same court said:

> "There can be no presumption contrary to an undisputed fact. The fact negatives the presumption."
> *Heine* v. *United States*, C. C. A. 6th, 135 Fed. (2d) 914.

In *Moorman* v. *Taylor*, 285 Ky. 347, the Court of Appeals of Kentucky recognized the distinction and held the stat-

ute must be literally followed and complied with in every prerequisite, and the record must show upon its face that the provisions of the statute have been complied with or the judgment will be treated as void and inoperative.

What the Circuit Court of Appeals adjudicated early in its first opinion as an undisputed fact, *i. e.*, a "complete transcript of the record," became in the opinion on rehearing an incomplete record, which to give it validity, required the aid and assistance of a presumption, that the Clerk of the U. S. Supreme Court made an error, and a further presumption that if the error were corrected, the record then might show that the Clerk of the Pike County Circuit Court made the statutory endorsement on the original petition. Obviously the conclusion reached is no more comprehensive or satisfactory than the reasoning used. Both the reasoning and the conclusion reached are unsound and if the conclusion reached is to stand the law on the subject is in hopeless confusion.

III.

Where a special statute requires the recording of a forfeiture judgment and a sale for cash and an accounting to the owner of record, the mere rendering of the forfeiture judgment without recording and without sale and without accounting to the owner, does not divest the owner of his title and interest in said land, nor can such judgment be set up as a bar to the owner or one holding through him to assert his rights of ownership in the land.

Sec. 4 of Art. III of the forfeiture statute required that certified copies of the forfeiture judgment "shall be recorded in the deed book of the county where the land or any part thereof lies and indexed as deeds are required

to be indexed." The record clearly shows that there was no compliance with this section of the statute.

Sec. 3 of Art. III of the forfeiture statute provided that the prayer of the petition shall be "for a judgment of forfeiture and sale of the title or claim in the petition described."

Sec. 4 provided for redemption and purchase back by the owner.

Sec. 7 provided that title to the land not purchased back by the owner under Sec. 4, and not vested in the occupant as provided in Sec. 6, "shall be sold to the highest and best bidder for cash in hand." A sale was required to be made under a judgment of the court at public auction at the front door of the court house after notice of sale had been advertised in the manner required by law in the case of the sale of land under execution. The sale was required to be confirmed by the court and the money realized from the sale was to be distributed by order of the Court first, to the payment of the costs of the suit, to be fixed by the court, second, to the payment of the taxes due to the County and State, and third, "the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns."

The record is absolutely silent as to any compliance with the cited sections of the Forfeiture Act of Kentucky, even to the point of recording the forfeiture judgment.

The court below recognized this deficiency in the record and resorted to an erroneous construction of the statute in holding that there was no necessity of a sale or account-

ing to the former owner where there was a showing of adverse possession under Sec. 4 of the statute. Assuming, without conceding, that this interpretation is correct there is positively nothing in the record to establish the fact of adverse possession of the lands in controversy at the time of the forfeiture suit. Furthermore, this interpretation of the statute is in direct conflict with the decisions of the courts of Kentucky which must be followed with respect to forfeitures under the Forfeiture Act of Kentucky. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

A sale is required. *Kentucky Union Company* v. *Commonwealth*, 108 S. W. 931. In *Davidson* v. *Lewis, Judge*, 159 Ky. 798, 169 S. W. 538, in a mandamus action, it was held to be the mandatory duty of the Judge, after the waiting time required by Section 4 had lapsed, to order a sale of the entire forfeited title irrespective of rights of adverse claimants. This decision affirmed the law laid down in *Kentucky Union Company* v. *Commonwealth*, 128 Ky. 610, 108 S. W. 931. Both of these cases were reaffirmed in *Flinn* v. *Blakeman*, 254 Ky. 416, 71 S. W. (2d) 951, and *Fordson Coal Co.* v. *Mills*, 234 Ky. 64, 27 S. W. (2d) 382.

The decisions in the cited cases may be applied with greater effect in the instant case by reason of the fact that it may reasonably be presumed that there was a recording of the forfeiture judgment in those cases, whereas in the instant case the record is silent even as to the recording of the judgment.

Section 3 of the Forfeiture Act provides:

> "The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title

> or claim sought to be forfeited is based; and no other title, claim or possession or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described."

The language is clear. The decisions of the Kentucky Court last above cited are uniform. There *must* be a sale and the purchaser at the sale is required to litigate any question of possession with adverse claimants mentioned in section 5 by an independent suit or suits. The Circuit Court of Appeals indulged in an unwarranted presumption in holding that a sale in the present case was unnecessary because all of the Haskell grant might be in possession of adverse claimants not even parties to the forfeiture proceeding under section 5 and hence a sale was unnecessary.

All that the Commonwealth of Kentucky acquired by reason of the forfeiture judgment here under review was a lien upon the land and the owner was not and could not be divested of title until there was a sale, preceded and succeeded by all of the other requirements of the statute.

Keyes v. *State*, 121 Maine 306.

Thevenin v. *Lessee of M. D. Slocum*, 16 Ohio 519.

Any other interpretation of the statute is tantamount to saying the State may divest an owner of his property without due process of law, and violates not only the provisions of the special statute but the due process clause of the State and Federal Constitutions. The decision reached is in conflict with the settled law of Kentucky and the decisions of this Court and hence requires the exercise of the supervisory powers of this court.

IV.

Where a special State Statute of forfeiture to the State of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, and that Statute is repealed before all of such steps have been taken, without a saving clause in favor of pending actions, any judgment rendered under the repealed Statute may not be set up as a bar to the right of the owner, or one holding title through such owner, to assert his right of ownership in the land.

The Court below found that all of Article III (the forfeiture statute) was repealed by the Commonwealth of Kentucky, in 1938, without a saving clause respecting pending litigation (R. 354-5). Under the decision of this court in *South Carolina* v. *Gaillard*, 101 U. S. 433, 428, such a repeal stops all suits where the repeal finds them and no relief could thereafter be granted.

At the time of repeal the forfeiture proceeding with respect to the Haskell grant was still pending, awaiting recording, sale and distribution. There had been no divesting of title in the then present owners, nor could there be a divesting of title after repeal of the statute under which the action was instituted.

The decision that the owners' title was divested without a sale and accounting to the owner is in conflict with the decisions of this court and that of the states of Maine (*Keyes* v. *State*, 121 Me. 306), and Ohio (*Thevenin* v. *Lessee*, 16 Ohio 519).

V.

Where one section of a State Statute provides for "actual" and personal service upon non-residents whose addresses are known, and another section for "constructive" service upon non-residents whose addresses are unknown, the trial court does not obtain jurisdiction by constructive service of non-residents whose addresses are known.

Sec. 56 of the Acts of the General Assembly of the Commonwealth of Kentucky, 1890 Session, Ch. 876, page 101, provides for actual and personal service on non-residents whose addresses are *known*, and Sec. 57 of the same Act of the Legislature provides for constructive service on non-residents whose addresses are *unknown*. The Court below construed these sections of the Kentucky Legislature to be alternative methods of procedures in making service on non-residents. The court, however, admits in its opinion (R. 349) that these sections of the State Legislature have never been subject to interpretation or construction by the Court of Appeals of Kentucky. Based on the mere fact that these sections of the statute had never been subject to construction by the highest court of the State the court below presumed the sections to be alternative. This construction is diametrically opposed to the generally accepted principles of law that constructive service can never be substituted for actual and personal service in the absence of a showing that actual and personal service cannot be had.

Constructive service was unknown at common law and is limited to cases of necessity.

Statutes providing for service of process by publication have been generally sustained when assailed on constitutional grounds but only where personal service cannot be

had, and is never permissible where personal service is practicable, even though personal service is difficult to obtain. For a collection of cases on this subject, see 50 Corpus Juris, p. 498, Sec. 107; p. 496, Sec. 105, and p. 516, Sec. 150.

There is presented by this point an important public question which has not been decided by this court or the courts of Kentucky or the courts of last resort of any other state.

VI.

The judgment of forfeiture of title limited to lands in one county of the State of Kentucky does not operate to forfeit title to all lands of the same parties defendant in all counties of the State in an action brought under the forfeiture act of the State of Kentucky.

The court below seems to have recognized this principle of law but proceeded to conclude that all of the lands of the Haskell grant passed under the forfeiture proceeding brought in Pike County. This conclusion is predicated on the assumption that all of the Haskell grant was embraced in the petition before the court in Pike County.

This conclusion does not harmonize with the acts of the officials of the State of Kentucky for the record discloses that when this point was raised with respect to the Haskell grant in the proceeding below the officials of the State of Kentucky in 1941 instituted a proceeding in the Floyd County Court covering the same Haskell grant in its entirety and included the land in Pike, Floyd, Knott and Letcher Counties (R. 264-271).

It is jurisdictional under Article III of the Forfeiture

statute that the Commonwealth file as an exhibt with its forfeiture petition a "copy of the grant". (Sec. 3, Art. III.) The Commonwealth did file a copy of the Haskell grant to satisfy this jurisdictional requirement which did not extend the courts jurisdiction over property not described in the petition.

It is the settled law in Kentucky that the owner may claim to own the entire land set forth in the boundary of the grant (*Eastern Kentucky Coal Lands Co.* v. *Commonwealth*, 111 S. W. 362), or he may claim a part upon which he has paid taxes (*Lockard* v. *Commonwealth*, 118 S. W. 331, 133 Ky. 369), so long as he properly identifies and describes the land which he claims to own. (*Commonwealth* v. *Gatliff*, 116 S. W. 263, 132 Ky. 95.) A case of forfeiture is not made against any acreage named in the grant upon which taxes have been paid. (*Commonwealth* v. *Cornett*, 146 Ky. 45, 141 S. W. 366.)

Obviously, the Commonwealth only had a cause of action for forfeiture against that part of the grant upon which taxes had not been paid, and obviously the Commonwealth had the right to limit its forfeiture proceeding to a portion of the grant less than the whole and did so in the instant case. There is not the slightest indication that the petition did or was intended to cover the whole Haskell grant. On the contrary, it clearly appears the petition was carefully and deliberately drawn with the intention of confining the court's jurisdiction in the Pike County forfeiture suit to that part of the Haskell grant in Pike County, *viz.*:

1. The caption states that the suit is against certain named defendants, unknown owners and certain tracts of land. The forfeiture suit involved 22 patents and in each

and every instance in the caption of the forfeiture petition the description is limited to "all that part that is situated in Pike County, Kentucky * * *." (R. 37).

2. The tracts of land sought to be forfeited in the forfeiture petition are next described in the body of the petition, and again each, every and all of the descriptions are limited to "all that part that is situated in Pike County, Kentucky * * *" (R. 38).

3. It further appears in the body of the forfeiture petition that the Commonwealth had caused an examination to be made of the owners and the assessment and payment of taxes and that examination appears from apt words in the forfeiture petition to have been definitely limited to Pike County (R. 39).

4. The detail of this examination includes the examination of deeds, mortgages and conveyances and no deeds, mortgages or conveyances are described other than those of record in Pike County.

5. The testimony of the witness for the Commonwealth in support of the forfeiture petition was limited to the listing and payment of taxes in Pike County (R. 88-114).

6. The letter of the attorney for non-residents and unknown defendants stated that there had been filed a petition in the Circuit Court Clerk's office of Pike County against "yourself and others as claimants under the surveys and patents hereinafter stated of the land therein described * * *," and "the petition described each tract by metes and bounds * * *" and that "each and all of said tracts of land lie wholly or partially within the County of Pike" (R. 72).

7. The attorney for non-residents and unknown defendants further stated "the tracts of land, title to which is sought to be forfeited * * * are described in the enclosure herewith, which is a copy of the caption of the petition insofar as it describes and refers to the patents and surveys * * * sought to be forfeited * * *." (R. 72).

8. The judgment in the forfeiture proceeding is directed against "the lands in said petition and hereafter described," and the description of the lands "hereafter described" in the judgment order respecting each of the tracts of land, in each and every instance is limited to "all that part that is situated in Pike County, Kentucky * * *." (R. 128).

9. A part of the Haskell grant lies in Floyd, Knott and Letcher Counties and not one of these counties is so much as mentioned in the petition or in the forfeiture judgment.

So it appears conclusively and definitely that on each occasion when there was an opportunity to make reference to the lands against which the forfeiture proceeding was directed, the description of the land was limited to "all that part which is situated in Pike County, Kentucky."

Thus we find the decision of the lower court predicated upon a foundation which has no support in the record, the effect of which is to deprive the plaintiffs of their property in Knott, Fletcher and Floyd Counties without due process of law. This is so, even assuming the forfeiture proceedings to be valid in all respects.

VII.

The judgment of this court sustaining the constitutionality of the Kentucky Forfeiture Statute may not be relied upon as a basis for a factual finding that the judgment of the Pike Circuit Court forfeiting the lands embodied within the Haskell Grant to the Commonwealth of Kentucky was valid in all particulars and that plaintiff and its predecessors in title therefore had no interest in the lands covered by the grant.

The question of the validity of the forfeiture proceeding was not involved in that case when it reached this court on review. The sole question involved was the constitutionality of the Forfeiture Act of Kentucky. This is evidenced by the language of Mr. Justice Day in proceeding to a consideration of the issues involved, wherein he said:

> "This court is concerned only with the constitutionality of the law in view of applicable provisions of the Federal Constitution", and passed "questions which are purely of a state character, and which were ruled upon against the contentions of the plaintiff in error by the court of appeals of Kentucky." 219 U. S. 140, 151; 55 L. Ed. 154.

VIII.

A judgment in a forfeiture proceeding under the Forfeiture Act of Kentucky may not be relied upon as constituting a divesting of the property right of the owner of lands with respect to which he has paid the taxes for three of the five years prescribed by the Forfeiture Act.

There is no dispute that the predecessor in title to this petitioner paid taxes for three of the five years period from 1901 to 1905 prescribed in the Forfeiture Act, hence,

regardless of any other approach to the issues involved in this proceeding, the original forfeiture proceeding did not have the effect of divesting the title in the lands of the Haskell grant held by the predecessors in title to the petitioner here.

In the Pike County forfeiture proceeding, in sustaining the constitutionality of the law, the Court of Appeals of Kentucky said:

> "The forfeiture is not a tax nor is it the equivalent It is a penalty imposed for the violation of a statute * * *.
>
> "A sale for taxes that have been paid is void; therefore it is of the first consequence that the assessments should be such as that if the lands were sold under it, the title of the taxpayer would pass, otherwise no one would be justified in bidding at the sale, and the State would get none of its taxes in spite of its efforts. Furthermore, if the taxpayer did not pay within the time fixed in the statute, and the State was elected to forfeit his title, if the assessment was ineffectual, the proceeding to forfeit must fall by the way."

This decision is a full and complete answer to the question presented. It is to the effect that there could be no judgment of forfeiture under the Kentucky statute with respect to lands on which taxes had been paid.

If defendant's affidavits put in issue a factual question as to the payment of taxes, the court was not authorized nor permitted to dismiss plaintiff's action in a summary proceeding (See Point I).

CONCLUSION.

In consideration of all of which it is respectfully submitted that the application for writ of certiorari should be granted.

JAMES A. COSGROVE,
National Press Building,
Washington, D. C.,
Attorney for Petitioner.

GILBERT F. WAGNER,
GEORGE F. CALLAGHAN,
105 West Adams Street
Chicago, Illinois,
Of Counsel.